

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

WILLIAM EDWARD DAVIS JR.,
Petitioner.

No. 2 CA-CR 2015-0243-PR
Filed August 10, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Yavapai County

No. P1300CR20090785

The Honorable Tina R. Ainley, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Sheila Sullivan Polk, Yavapai County Attorney, Prescott
Counsel for Respondent

William E. Davis Jr., Buckeye
In Propria Persona

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 William Davis seeks review of the trial court's order summarily dismissing his untimely notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Davis has not met his burden of demonstrating such abuse here.

¶2 Davis pled guilty to two counts of attempted first-degree murder, and one count each of armed robbery, first-degree burglary, theft of a means of transportation, weapons misconduct, attempted armed robbery, credit card theft, criminal damage, and theft. In May 2010, the trial court sentenced him to a combination of concurrent and consecutive prison terms totaling eighteen years. Davis signed a form informing him that he was required to file a notice of post-conviction relief within ninety days "of the entry of Judgment and Sentence" and warning him that, if he failed to do so, he "may never have another opportunity to have any errors made in your case corrected by another Court."

¶3 In November 2010, Davis filed a notice of post-conviction relief requesting the appointment of counsel and indicating his failure to timely file his notice "was without fault on [his] part." He stated he had "just" arrived at the Department of Corrections and it had taken three months "to get approved for P5." The trial court dismissed the notice as untimely. Davis did not seek review of that ruling.

¶4 In December 2013, Davis filed a notice of and petition for post-conviction relief, again claiming his failure to timely seek relief was without fault on his part, explaining that he has only "a

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9th grade education and is mentally ‘slow,’” a paralegal did not help him, he had been transferred, and had only recently “found someone to really help him.” In his accompanying petition, he also argued his sentences were improper, his counsel was ineffective in failing to raise those issues, and that he was entitled to raise those claims in an untimely proceeding. The trial court dismissed the notice as untimely, further noting the petition contained “no legal basis.” This petition for review followed.

¶5 On review, Davis first asserts the trial court was required to address his claims pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995). But nothing in that decision addresses post-conviction relief under Arizona law; the Supreme Court instead addressed the showing required to overcome procedural default in federal habeas corpus proceedings. *See id.* at 326-27. Pursuant to Rule 32.4(a), only claims raised pursuant to Rule 32.1(d) through (h) may be raised in an untimely proceeding like this one. The only such claim Davis has raised¹ is a claim pursuant to Rule 32.1(f) that his failure to timely seek post-conviction relief was without fault on his part. But Davis was required to provide “meritorious reasons . . . substantiating the claim and indicating why [it] was not stated in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). Davis has not explained why his transfer or education level prevented him from timely filing a notice of post-conviction relief.

¶6 We also reject Davis’s argument that he is nonetheless entitled to raise a claim that his sentences were improper. A claim that a sentence exceeds that allowed by law is governed by Rule 32.1(c) and is not exempt from the timeliness requirement of Rule 32.4(a). Although sentencing error is subject to fundamental error review in some circumstances, it nonetheless is subject to preclusion. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 6-7, 23, 203 P.3d 1175, 1177, 1180 (2009) (holding illegal sentence claim precluded); *Swoopes*, 216 Ariz. 390, ¶ 42, 166 P.3d at 958 (fundamental error not excepted from preclusion). And, insofar as Davis suggests he is

¹Davis indicated in his second notice that he was raising a claim of newly discovered evidence but he has not identified any such evidence. *See* Ariz. R. Crim. P. 32.1(e), 32.4(a).

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entitled to raise his sentencing claims pursuant to *Stewart v. Smith*, 202 Ariz. 446, 46 P.3d 1067 (2002), because they are of sufficient constitutional magnitude to require a knowing waiver, we have explained that reasoning does not apply to untimely proceedings like this one, *State v. Lopez*, 234 Ariz. 513, ¶¶ 7-8, 323 P.3d 1164, 1166 (App. 2014).

¶7 Finally, Davis appears to argue the trial court erred by failing to consider his petition. First, it appears the court did review Davis's petition. But, in any event, even viewing his notice and petition together, Davis did not comply with Rule 32.2(b) and 32.4(a), and the court was correct to summarily dismiss the proceeding.

¶8 Although we grant review, we deny relief.